No. 47687-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANDRES SEBASTIAN FERRER,

APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY
The Honorable Greg Gonzales

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. *This Court Should Not Follow Atkinson*

The State argues that *State v. Atkinson*, 113 Wn. App 661, 54 P.3d 702 (2002), is still "good law" and should be followed by this Court. *Response to Supplemental Brief* ("*Resp.*") at 5-9. In this regard, the State cites to the recent dispute within Division Three regarding "horizontal *stare decisis*" between divisions of the Court of Appeals. *Resp.* at 8 (citing *In re Pers. Restraint of Arnold*, ___ Wn. App. ___, ___ P.3d ___, 2017 Wash. App. LEXIS 946 (No. 34018-0-III, 4/25/17)). The State's arguments should be rejected.

First, the State ignores the principle that, "[i]n cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised." *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) (quoted in *In re Pers. Restraint of Swagerty*, 186 Wn.2d 801, 809 n.1, 383 P.3d 454 (2016)).

A careful review of *Atkinson* reveals that Division Three never addressed any constitutional issues in its decision. Despite the mention that Mr. Atkinson argued that the definition of "disfigurement" "relieved the State of its burden to prove substantial bodily harm," *State v. Atkinson*, 113 Wn. App. at 665, Division Three did not characterize the appellant's argument as being constitutional. Rather, the court framed the argument as one of state law only:

> Mr. Atkinson argues that because the court's definition of "disfigurement" is overly broad, the court's instruction regarding substantial bodily harm misstated the law and misled the jury. According to Mr. Atkinson, he could not argue his theory of the case because the court's instructions effectively eliminated the distinction between second degree assault and fourth degree assault. . . .
>
> . . .
>
> The court's definition of "disfigurement" was accurate and merely supplemented and clarified the statutory language . . . . The court's jury instructions were sufficient because they are supported by substantial evidence, allowed the parties to argue their theories of the case, and properly informed the jury of the applicable law.

State v. Atkinson, 113 Wn. App. at 667-68.

Because *Atkinson* did not analyze the instruction under either the Federal or Washington Constitutions, its holding does not "bind" this Court in the current case.

Moreover, a decision by one panel of the Court of Appeals cannot "bind" another panel of the Court of Appeals when addressing federal constitutional issues. Not even the Washington Supreme Court's decisions on federal constitutional issues are "binding" on this Court:

> We are bound by our Supreme Court's decisions announcing Washington law and interpreting the Washington Constitution. However, decisions of the United States Supreme Court control us in deciding federal constitutional issues.
>
> Our State Supreme Court has explicitly recognized its lack of authority in federal constitutional matters. . . . In the face of this, it is illogical to suggest that we are bound to follow a mistaken application of federal constitutional principles by our Supreme Court.

State v. Kitchen, 46 Wn. App. 232, 239-40, 730 P.2d 103 (1986) (Worswick, C.J., concurring), *aff'd* 110 Wn.2d 403, 756 P.2d 105 (1988).

Different divisions frequently disagree with each other, and while Division Three in *Arnold* expressed concerns about due process violations that could arise from conflicting Court of Appeals' decisions, Slip Op. at 7,[1]

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[1] Significantly, the plurality in *Arnold* relied heavily in its discussion of *stare decisis* on the Supreme Court's decision in *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 466 P.2d 508 (1970). Slip Op. at 5. In *Stranger Creek*, the Court stated:

> [W]e also recognize that stability should not to be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires.

(continued...)

not only do such concerns not exist in this case (where *the State* has no right to due process at all), but it is settled that a citizen actually has no legitimate expectation that a decision of a particular division of the Court of Appeals is "the law" in Washington. *See State v. Elliott*, 114 Wn.2d 6, 18-19, 785 P.2d 440 (1990) (no *ex post facto* violation when one division of Court of Appeals adopts a rule regarding sentencing[2] that conflicts with that previously applied by another division[3]). Accordingly, different panels often issue conflicting decisions.[4] Thus, *Atkinson* is not "binding" on this Court.

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[1](...continued)
In re Rights to Waters of Stranger Creek, 77 Wn.2d at 653. Applying these principles, this Court then overruled nearly fifty years of precedent involving riparian water rights. *Id.* at 657.

[2] *State v. Song*, 50 Wn. App. 325, 748 P.2d 273 (1988).

[3] *State v. Mason*, 31 Wn. App. 680, 644 P.2d 710 (1982).

[4] *Compare State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009) (striking down recklessness instruction) *with State v. Holzknecht*, 157 Wn. App. 754, 765, 238 P.3d 1233 (2010) ("We respectfully disagree" with *Hayward*); *compare First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development*, LLC, 178 Wn. App. 207, 314 P.3d 420 (2013) (adopting one construction of Washington's deeds of trust act) *with Washington Federal v. Gentry*, 179 Wn. App. 470, 486, 319 P.3d 823 (2014), *aff'd sub nom. Wash. Fed. v. Harvey*, 182 Wn.2d 335, 340 P.3d 846 (2015) ("We disagree with the reasoning and conclusion in" *First-Citizens Bank & Trust Co.*). *See also State v. McGee*, 122 Wn.2d 783, 791, 864 P.2d 912 (1993) (Brachtenbach, J., concurring) (rejecting dissenting justices' conclusion that the existence of different conclusions about statutory language by two different divisions of the Court of Appeals required the conclusion that the statute was ambiguous and thus subject to rule of lenity – "*This* court has the ultimate duty and authority to determine whether a statute is ambiguous).

In any case, *Atkinson* is not sound. Apart from pre-dating current issues about the role of implicit bias in the legal system, *see, e.g., State v. Saintcalle*, 178 Wn.2d 34, 46, 309 P.3d 326 (2013), and apart from its failure to consider constitutional objections to a "disfigurement" instruction defined by reference to a complainant's "beauty," the case upon which it relies – *State v. Hill*, 48 Wn. App. 344, 739 P.2d 707 (1987) – was not a case that involved a challenge to a jury instruction. Rather, the issue raised in *Hill* involved a challenge to sufficiency of the evidence in a bench trial where the trial court had found that a passenger in a car involved in an automobile accident had sustained "serious permanent disfigurement," which included permanent scarring. 48 Wn. App. at 347.[5] Moreover, the cases cited by *Hill* (the "other jurisdictions [that] have approved of the same definition of disfigurement," *Resp.* at 5 n.3) are actually all civil cases, some dating back to the 1940s,[6] and are not particularly pertinent to determining whether a definition of

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[5] Similarly, another case relied upon by the State – *State v. McKague*, 172 Wn.2d 802, 262 P .3d 1225 (2011) – also involved a challenge to the sufficiency of the evidence, holding that "facial bruising and swelling lasting several days, and the lacerations to his face, the back of his head, and his arm were severe enough to allow the jury to find that the injuries constituted substantial but temporary disfigurement." *Id.* at 806. This holding has little to do with the instructional issue in this case.

[6] *See State v. Hill*, 48 Wn. App. at 347 (citing *Gillman v. Gillman*, 319 So. 2d 165, 166 (Fla. Ct. App. 1975); *Caruso v. Hall*, 101 A.D.2d 967, 477 N.Y.S.2d 722 (1984); *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 25 S.E.2d 865 (1943)).

"disfigurement" that relies upon subjective determinations of "beauty" is constitutional in a criminal case where liberty is at stake.

Accordingly, this Court should not follow *Atkinson*.

2. *All of Mr. Ferrer's Arguments Are Properly Considered On Their Merits*

The State complains that the constitutional issues involving judicial comments on the evidence, due process and equal protection were not raised below and thus should not be considered on appeal. *Resp.* at 9-12. The State, of course, failed to raise this particular objection in the Washington Supreme Court, the State having opted against filing any answer to Mr. Ferrer's supplemental petition for review.[7]

By failing to argue waiver and by failing to argue that RAP 2.5(a)(3) does not apply when explicitly presented with the opportunity to do so, the State made a tactical decision, hoping that the Supreme Court would simply deny review without the State having to respond to the issues presented by Mr. Ferrer to the Supreme Court.[8] Having made this tactical choice, the State

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[7] Both Mr. Ferrer's petition and supplemental petition are available on-line at http://www.courts.wa.gov/appellate_trial_courts/supreme/?fa=atc_supreme.petitions (No. 93634-0).

[8] Under RAP 13.4(d), "[a]party *may* file an answer to a petition for review." Emphasis added. A party need not file an answer and the decision to file one or not is tactical in nature.

should not be heard to raise a procedural objection at a later point when its strategy did not work out the way it planned.[9]

The State's current desire to bar review based upon a procedural argument is simply too late, given the fact that the Supreme Court has made the following ruling:

> That the Petition for Review is granted only as to the jury instruction regarding disfigurement and the case is remanded to the Court of Appeals Division II to address the issue on the merits.

State v. Ferrer, Sup. Ct. No. 93634-0, Feb. 8, 2017. The Supreme Court's holding is that this Court should address the issues about the disfigurement instruction "on the merits." This is the "law of the case." *See Tucker v. Brown*, 20 Wn.2d 740, 774, 150 P.2d 604 (1944) (adjudication by the supreme court on an issue becomes the law of the case on a subsequent appeal). The State's technical argument has come too late.

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[9] *See, e.g., Wood v. Milyard*, 566 U.S. 463, 470-74, 132 S. Ct. 1826, 182 L. Ed. 2d 733 (2012) (explaining circumstances of how State can waive statute of limitations defenses in habeas litigation); *United States v. Ewing*, 638 F.3d 1226, 1229-30 (9th Cir. 2011) (holding that the government, as appellee, waived any argument with respect to the district court's ruling on defendant's standing to challenge the search of his vehicle because the issue was not argued in the government's briefs); *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011) (refusing to affirm search on bases not argued by State and holding Court of Appeals erred in so doing; State waived issue on appeal by conceding it in CrR 3.6 hearing); *In re J.J.*, 96 Wn. App. 452, 454 n.1, 980 P.2d 262 (1999) (failure of reply brief to address findings filed following opening brief constitutes concession that there was no prejudice).

In any case, the issues raised are all constitutional in nature involving article I, sections 3, 12, 21 & 22, article IV, section 16, and XXXI, section 1 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. The issues certainly can be considered under RAP 2.5(a)(3), particularly where there was in fact an exception below to the instruction below.[10]

The State next argues that the error here is not "manifest" because of the absence any evidence about the culture in which the jurors were raised or the ethnicity or appearance of Kristina Ferrer. *Resp.* at 11-12. Apart from the fact that photos of Kristina Ferrer *were* introduced at trial and have already been designated to this Court as exhibits (transmitted on October 14, 2015), and thus the Court can see Ms. Ferrer's Western European appearance, Ex. 17 & 35, this is a specious argument.

Jurors are presumed to follow their instructions. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). Instruction No.

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[10] The State at one point concedes that Mr. Ferrer objected below to Instruction No. 10 on the ground that it lowered the State's burden of proof. *Resp.* at 4 n.2. It later argues that Mr. Ferrer did not preserve a due process objection. *Resp.* at 9. However, when an instruction unconstitutionally lessens the State's burden of proof, the instruction violates the Due Process Clauses of the Fourteenth Amendment and article I, section 3. *See generally State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000) (citing *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970) for proposition that instruction that relieves State of its burden of proof is unconstitutional).

10 encouraged the jurors, whatever their ethnicity or cultural biases, to decide whether the State had proven an essential element of assault in the second degree by reference to the vague and amorphous concepts of "beauty," "unsightly," and "imperfect." While certainly such concepts tend to perpetuate patriarchal and racist stereotypes favoring dominant cultural concepts, whether the jurors in this case in fact convicted Mr. Ferrer because of such dominant stereotypes is not the issue. "Beauty" is too subjective of a standard for it to be the point of decision between a felony and a gross misdemeanor, whatever origin the jurors were and whatever subjective feelings they had about Ms. Ferrer's beauty.[11]

When there is an erroneous jury instructions, one does not need to have an evidentiary hearing where jurors come to court and testify about their thought processes. This would be improper.[12] Rather, the issue is whether there is only "a reasonable likelihood that the jury has applied the challenged

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[11] In this way, the Supreme Court has held that any defendant has standing to challenge a racially discriminatory jury selection practice, whether the defendant is in a protected class or not. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (white male, convicted by all-white jury, could bring equal protection challenge to exclusion of non-white jurors); *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979) (male successfully challenged exclusion of women from juries).

[12] *See State v. Gay*, 82 Wash. 423, 437-39, 144 P. 711 (1914); *State v. Reynoldson*, 168 Wn. App. 543, 549-50, 277 P.3d 700 (2012).

instruction" in an impermissible way. *Estelle v. McGuire*, 502 U.S. 62, 72 & n. 4, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990)). This test is met here, and thus the constitutional errors which afflict Instruction No. 10 are in fact "manifest." Review is appropriate under RAP 2.5(a)(3).

3. *The Error is Not Harmless*

The State's arguments about harmlessness miss the mark, confusing the test for sufficiency of the evidence with the constitutional harmless error test.[13] For instance, the State argues that there was evidence that Ms. Ferrer suffered bruising and that "[t]his evidence established a temporary but substantial disfigurement and is clearly sufficient under the case law." *Resp.* at 13. Similarly, the State notes how Ms. Ferrer claimed that she had headaches, saw spots and suffered dizziness: "This evidence established a temporary but *substantial* loss or impairment of the function of any bodily

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[13] The State argues:

> Even if the disfigurement instruction [that] was given [was] error any such error is harmless, whether under the non-constitutional standard or the constitutional standard.

Resp. at 12. The State fails to cite or mention either standard, and makes no argument as to why the "non-constitutional standard" is appropriate at all in this case.

part or organ, here her brain and/or eyes, and is sufficient under the case law." *Resp.* at 13 (emphasis in original).

Thus, the State concludes:

> Though when convicting a defendant of a crime a "jury need not be unanimous as to any of the definitions [of that crime] nor must substantial evidence support each definition," here substantial evidence supported two of the definitions of "substantial bodily harm." [*State v.*] *Linehan*, 147 Wn.2d [638] at 649-650[, 56 P.3d 542 (2002)]. Thus, even if there was error related to the "disfigurement" instruction, the error is harmless since there was sufficient and substantial evidence to sustain Ferrer's conviction since Kristina suffered substantial bodily harm under another definition.

Resp. at 13-14.

But the tests for sufficiency of the evidence and harmlessness are different. Sufficiency under the Due Process Clauses of the Fourteenth Amendment and article I, section 3 is tested by "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

This is a very different inquiry than harmlessness, which applies the following test: "A harmless error is an error which is trivial, or formal, or

merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *In re Det. of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (internal quotations omitted). "[A]n error is presumed prejudicial unless we conclude the error could not have rationally affected the verdict." *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003). "[I]f trial error is of constitutional magnitude, prejudice is presumed and the State bears the burden of proving it was harmless beyond a reasonable doubt." *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013) (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). Notably, the State's brief neglects even to cite this standard or analyze the case under it.

Because of the differences in such tests, there may be sufficient evidence to sustain a conviction, but reversal is still required due to instructional error. *See, e.g., State v. Schaler*, 169 Wn.2d 274, 288-91, 236 P.3d 858 (2010) (instructional error not harmless, but sufficient evidence to sustain harassment conviction). And it is federal constitutional error to apply a sufficiency test where a harmless error or materiality test is required. *See, e.g., Crace v. Herzog*, 798 F.3d 840 (9th Cir. 2015) (upholding federal habeas relief where state court erroneously applied the *Jackson v. Virginia*

sufficiency test rather than the materiality test mandated by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012) ("[D]eciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury's verdict. [Citation omitted] We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient.").

In the instant case, while Mr. Ferrer did challenge the sufficiency of evidence at trial,[14] he is not currently raising on appeal as an assignment of error a challenge to the sufficiency of the evidence. Rather, his assignment of error relates to Instruction No. 10, and thus the issue is whether the State can prove the instructional error is harmless beyond a reasonable doubt.

While the State now stresses a theory of the case other than "disfigurement," *Resp.* at 13 (noting that Ms. Ferrer complained of

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[14] Mr. Ferrer in fact never conceded that he caused substantial bodily harm at trial, under any definition. As his attorney argued to the jury, "[T]here's no evidence of any loss or impairment or function of any body part or organ. There's not. Not in this case. Not at all . . . [W]e don't have substantial bodily injury in this case." RP 796.

"'headache, dizziness, neck pain and seeing spots,'" and that "[t]his evidence established a temporary but substantial loss or impairment of the function of any bodily part or organ, here her brain and/or eyes, and is sufficient under the case law."), that was not how the case was argued to the jury. When the State referred the jury to the issue of "substantial bodily harm," the emphasis of the State's argument was on "disfigurement":

> Substantial bodily harm is defined for you in your instructions 9 and 10. So 9 tells you that substantial bodily harm is bodily injury that involves a temporary but substantial disfigurement. It goes on but I want to talk about disfigurement.

RP 757-58. The State then talked about bruising and how it met the definition of disfigurement. RP 758-59. While the State did at one time repeat the claim that Ms. Ferrer was still having headaches, dizzy spells and seeing stars, RP 759, this was not the focus of its argument as seen in its rebuttal argument:

> Now defense counsel talked about substantial bodily harm and having to have a broken bone or some deep tissue injury. That's not an accurate statement of the law. You have the law in your hands right now. Substantial bodily harm is about disfigurement and we have disfigurement. And it's also about strangulation and we have that too.

RP 805. Given the key role of the allegation of "disfigurement" in this case, the State cannot meet its burden of proving that an instruction based on such

vague terms as "beauty," "unsightly," or "imperfect" is harmless beyond a reasonable doubt.

As for Ms. Ferrer's claims of headaches and dizziness, the jury was not bound to accept her claims. Notably, some jurors rejected her claims that she was strangled, CP 71, and the evidence showed that Ms. Ferrer exaggerated, later claiming, for instance, that she lost control of her bowels and bladder during the altercation with Mr. Ferrer, when she failed to tell the responding police officer or even her treating physician about that, and the responding officer who was close to Ms. Ferrer did not smell anything of the sort. RP 299, 348, 434, 490-91.

Given questions about Ms. Ferrer's credibility and the central role of the allegation of "disfigurement," the error in allowing the jurors to base conviction on their subjective view that Ms. Ferrer's "beauty" had been diminished cannot be harmless beyond a reasonable doubt. Again, the assumption, not overcome by the State, is that the jurors followed their instructions. *Richardson v. Marsh, supra.* Thus, the assumption is that some jurors determined whether there had been "disfigurement" based upon the unconstitutional definition of that term. In the absence of any evidence that the jurors did not follow their instructions, and in the absence of argument by

the State that the error was harmless beyond a reasonable doubt, the remedy is to reverse Count I for a new trial.

B. CONCLUSION

For the foregoing reasons, and the reasons set out in prior briefing, this Court should reverse the conviction in Count I and remand for a new trial.

DATED this 31st day of May 2017.

Respectfully submitted,

s/ Neil M. Fox
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON, Respondent v. ANDRES SEBASTIAN FERRER Appellant.	NO. 47687-8-II CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On May 31, 2017, I served copies of the SUPPLEMENTAL REPLY BRIEF OF APPELLANT by depositing copies into the U.S. Mail with proper first class postage attached in envelopes addressed to:

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I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

May 31, 2017 - Seattle, WA
DATE AND PLACE

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